Supreme Court, U.S.
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No. 97-1443

In the Supreme Court of the United States

OCTOBER TERM, 1997

JEFFREY MAUSOLF, ET AL., PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the complaint filed by petitioners in this case, which sought judicial review of a 1992 order by which the Superintendent of Voyageurs National Park temporarily closed certain areas of the Park to snowmobiling, presents any currently justiciable issue in light of the court of appeals' uncontested finding that such closure orders remain in effect for a maximum period of one year.

2. Whether the government's decision not to appeal from the district court's judgment invalidating the 1992 closure order precluded the private intervenors from pursuing their own appeal.

3. Whether the National Park Service Organic Act authorizes the National Park Service to undertake wildlife preservation measures that are neither compelled nor prohibited by the Endangered Species Act.

4. Whether the closure order at issue in this case was arbitrary and capricious.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-18A) is reported at 125 F.3d 661. An earlier opinion of the court of appeals concerning the intervention motion of the non-federal respondents (Pet. App. 43A-62A) is reported at 85 F.3d 1295. The opinion of the district court (Pet. App. 21A-42A) is reported at 913 F. Supp. 1334. The district court's order regarding the intervention motion (Pet. App. 63A-64A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1997. A petition for rehearing was

denied on December 3, 1997. Pet. App. 77A. The petition for a writ of certiorari was filed on March 3, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Park Service Organic Act (1916 Organic Act) created the National Park Service (NPS) within the Department of the Interior. See Act of August 25, 1916, ch. 408, 39 Stat. 535. Congress has charged the NPS with the duties of

> promot[ing] and regulat[ing] the use of the Federal areas known as national parks, monuments, and reservations * * * by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. 1 (Supp. II 1996). Congress has further provided that "[t]he Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service." 16 U.S.C. 3 (Supp. II 1996).

In 1971, Congress enacted legislation authorizing the Secretary of the Interior to establish Voyageurs National Park (VNP). See Act of January 8, 1971, Pub. L. No. 91-661, 84 Stat. 1970 (codified as amended at 16 U.S.C. 160-160k (Supp. II 1996)). The 1971 Act

directs the NPS to administer VNP pursuant to the 1916 Organic Act "[e]xcept as hereinafter provided," 16 U.S.C. 160f(a), and provides that "[t]he Secretary may, when planning for development of the park, include appropriate provisions for * * * winter sports, including the use of snowmobiles," 16 U.S.C. 160h.

Voyageurs National Park is comprised of nearly 220,000 acres in northern Minnesota. Approximately 39% of the Park's area is made up of lakes or other waterbodies. Several packs of gray wolves have all or a part of their territory within the Park. The gray wolf population in Minnesota is listed as a threatened species under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.* (Supp. II 1996). See Pet. App. 24A-25A.

2. a. In 1991, the NPS issued regulations concerning snowmobiling in VNP. The regulations allowed snowmobiling on nearly all of the surface areas of VNP's four major lakes. 36 C.F.R. 7.33(b); Pet. App. 27A. The regulations also provided that "[t]he Superintendent may determine yearly opening and closing dates for snowmobile use, and temporarily close trails or lake surfaces, taking into consideration public safety, wildlife management, weather, and park management objectives." 36 C.F.R. 7.33(b)(3).

The Voyageurs Region National Park Association (a non-federal respondent here) challenged the 1991 regulations, contending that they were unlawful because the NPS had issued them without first preparing a wilderness area suitability study pursuant to Section 301(b) of the 1971 Act, 16 U.S.C. 160f(b).[1] The

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[1] Section 301(b) provided that such a study was to be issued within four years of the Park's establishment.

district court directed the NPS to prepare the wilderness plan, but it declined to enjoin snowmobiling in VNP pending completion of that plan. The court of appeals upheld the district court's decision not to issue an injunction. *Voyageurs Region Nat'l Park Ass'n.* v. *Lujan*, 966 F.2d 424 (8th Cir. 1992).

b. In 1991, the NPS released a draft wilderness plan for the VNP. Under that draft plan, snowmobiling would be allowed to continue upon the surfaces of the Park's four major lakes. Pet. App. 29A. Pursuant to Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), the NPS consulted with the Fish and Wildlife Service (FWS), an agency within the Department of the Interior, concerning the proposed plan.[2] The FWS issued

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[2] Section 7(a)(2) of the ESA requires each federal agency to "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." If an agency determines that action it proposes to take may adversely affect a listed species, it must engage in formal consultation with the FWS, which provides the agency with a written statement (the biological opinion) explaining how the proposed action will affect the species or its habitat. If the FWS concludes that the proposed action will jeopardize the continued existence of a listed species, the biological opinion must outline any "reasonable and prudent alternatives" that the FWS believes will avoid that consequence. 16 U.S.C. 1536(b)(3)(A). If the biological opinion concludes that the agency action will not result in jeopardy, or if it offers reasonable and prudent alternatives to avoid that consequence, the FWS must provide the agency with a written statement (known as an incidental take statement) specifying the "impact of such incidental taking on the species" and any "reasonable and prudent measures that the [FWS] considers necessary or appropriate to minimize such impact," and setting forth "the terms and conditions * * * that must be complied with by the Federal agency * * * to implement [those] measures."

a biqlogical opinion (see note 2, *supra*) concluding that implementation of the proposed plan was not likely to jeopardize the continued existence of any listed species. Pet. App. 30A. The opinion authorized the incidental taking of up to six wolves annually, contingent upon the NPS's implementation of reasonable and prudent measures that the FWS determined were necessary and appropriate to minimize harm to the gray wolf. Those reasonable and prudent measures included the closure to snowmobiling of certain bays and certain areas adjacent to portions of the shores of the Park's four major lakes. See *id.* at 4A, 29A-32A.[3]

c. In December 1992, the Superintendent of VNP signed an order closing certain bays or lakeshore areas of the Park's four major lakes to snowmobiling. Pet. App. 31A. The closure order was issued pursuant to 36 C.F.R. 7.33(b)(3), which authorizes the temporary closure of lake surfaces for wildlife management purposes. Pet. App. 4A-5A, 31A. The areas subject to the closure order comprised approximately seven percent of the Park's total water acreage. *Id.* at 5A n.5. Substantially identical closure orders were issued in 1993 and 1994. *Id.* at 5A.

3. a. Petitioners in this case are the Minnesota United Snowmobilers Association and three individual members of that organization. Pet. App. 34A. In January 1994, petitioners commenced this action

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16 U.S.C. 1536(b)(4). See *Bennett* v. *Spear*, 117 S. Ct. 1154, 1159 (1997).

[3] The FWS later issued a supplement to the biological opinion, which, *inter alia*, reduced the permissible number of incidental takings from six to two wolves per year. See Pet. App. 5A-6A, 32A-33A.

against the Secretary of the Interior and officials of the NPS and FWS. Petitioners alleged that the 1992 closure order was arbitrary and capricious because it lacked a sufficient evidentiary basis. *Id.* at 32A, 34A.

The district court granted petitioners' motion for summary judgment. Pet. App. 21A-42A. While rejecting petitioners' categorical assertion that wholly anecdotal evidence cannot suffice to support an ESA biological opinion, see *id.* at 39A, the court concluded that "the government's explanation for the lakeshore closures is presently inadequate," *id.* at 41A. The court remanded the matter to the FWS and the NPS with directions to supplement the administrative record with "further evidentiary findings." *Ibid.* The court enjoined the government from enforcing the closures pending the required administrative proceedings. *Ibid.*

b. While the action was pending in the district court, the private respondents—Voyageurs Region National Park Association and several allied groups—moved to intervene as defendants. A magistrate judge denied the intervention motion, Pet. App. 65A-76A, and that ruling was sustained by the district court, *id.* at 63A-64A.

The court of appeals reversed, holding that the private respondents were entitled to intervene as of right. Pet. App. 43A-62A. The court held, *inter alia*, that respondents had standing to sue under Article III of the United States Constitution, based on their allegation that the presence of snowmobiles would detract from their enjoyment of the VNP. *Id.* at 54A-57A.

c. It was while the private respondents' appeal on the intervention question was pending that the district court issued its decision on the merits, dis-

cussed above. Pet. App. 7A. Both the government and the private respondents filed notices of appeal from the district court's decision. *Ibid.* The government subsequently moved for dismissal of its appeal, which the court of appeals granted. *Id.* at 19A. The private respondents, however, continued to prosecute their appeal of the district court's injunctive order.

4. The court of appeals reversed the district court's merits ruling. Pet. App. 1A-18A. The court first concluded that the private respondents could pursue their appeal. *Id.* at 9A-11A. The court observed that respondents had already been determined (on the prior appeal concerning their motion to intervene) to satisfy the standing requirements of Article III. *Id.* at 9A. The court also held that an Article III case or controversy continued to exist notwithstanding the government's dismissal of its own appeal. The court explained that "the government has not revoked the closure order enjoined by the District Court, and the [private respondents] would likely benefit from our decision reversing the District Court and upholding that closure order." *Id.* at 10A.

Turning to the merits, the court of appeals observed that the district court had "analyzed the propriety of the NPS's Park closures solely under the authority granted to the agency by the ESA," Pet. App. 12A, but had "neglected to consider the closures in light of the" Organic Act or pertinent NPS regulations, *id.* at 13A. The court noted in particular that "[t]he 1992 Park closure order, on its face, declares that the order was issued '[u]nder the authority of Title 36, Code of Federal Regulations, Chapter 1, Section 7.33(b)(3).'" See *id.* at 14A. The court rejected petitioners' contention that the clo-

sures could not validly be deemed to be an exercise of the Superintendent's Section 7.33(b)(3) authority because that provision authorizes only "temporary" closures and the 1992 closure order contained no expiration date. The court explained that

> these orders are issued as temporary, annual directives that must be reviewed and either renewed or repealed through yearly compendiums establishing the management goals for the Park. Nothing in the language of the closure order indicates that it is intended to operate as a permanent closure and, because the orders are issued annually, the closures will be reviewed and either renewed or modified on a yearly basis. * * * Consistent with its past practice, we hold that, under 36 C.F.R. § 7.33(b)(3), the NPS must conduct, at minimum, an annual review if snowmobile trails are to be closed "temporarily" and such decisions must be supported by the record.

Pet. App. 14A-15A.

Reviewing the evidence under the "arbitrary [or] capricious" standard established by 5 U.S.C. 706(2)(A), the court of appeals sustained the 1992 closure order as a reasonable exercise of administrative authority. The court found that "[t]he evidence in the administrative record, while not overwhelming, is sufficient to provide a rational foundation on which the NPS could base its closure order." Pet. App. 16A. In light of its finding that "the administrative record supports the closures as measures taken to protect wildlife under 36 C.F.R. § 7.33(b)(3)" and other provisions specifically dealing with national park areas,

the court "decline[d] to consider the propriety of this closure under the ESA." *Id.* at 17A & n.12.

ARGUMENT

Because the closure order that was the subject of petitioners' suit expired more than five years ago, this case no longer presents a justiciable controversy. In any event, the decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals, and the case presents no issue of law warranting review by this Court. The petition for a writ of certiorari should therefore be denied.

1. The court of appeals concluded that closure orders issued by the VNP Superintendent pursuant to 36 C.F.R. 7.33(b)(3) are "temporary, annual directives that must be reviewed and either renewed or repealed through yearly compendiums," and that "the NPS must conduct, at minimum, an annual review if snowmobile trails are to be closed 'temporarily' and such decisions must be supported by the record." Pet. App. 14A-15A. Petitioners do not challenge that aspect of the court of appeals' decision, which is plainly favorable to their interests. Because the closure order that was the original subject of petitioners' challenge was issued in 1992,[4] and because any new closure order would be subject to review upon a new

[4] The court of appeals observed (Pet. App. 14A) that the 1992 closure order was renewed in 1993 and 1994. Neither it nor the district court suggested, however, that the 1993 and 1994 orders were also the subject of judicial review in this case. Even if petitioners' suit is understood as calling into question the validity of the 1993 and 1994 orders, those orders have also expired.

administrative record,[5] this case no longer presents a justiciable controversy. See *American Rivers* v. *National Marine Fisheries Serv.*, 126 F.3d 1118, 1123-1124 (9th Cir. 1997).

2. Even if a live controversy existed, this case would present no issue warranting review by this Court. Relying on *Diamond* v. *Charles*, 476 U.S. 54 (1986), petitioners contend (Pet. 13-19) that the court of appeals erred in holding that the private respondents could pursue their appeal from the district court's judgment after the government had secured a dismissal of its own appeal. Petitioners' reliance on *Diamond* is unavailing. The Court stated in that case that "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." 476 U.S. at 68. It concluded that the appeal should be dismissed because the intervenor lacked any judicially cognizable interest in the outcome of the suit. *Id.* at 64-71. In the present case, by contrast, the court of appeals held that the private respondents satisfied the requirements of Article III, see Pet. App. 54A-57A,[6] and petitioners do not chal-

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[5] As petitioners point out (Pet. 11 & nn. 1-2), the NPS has generated a considerable volume of additional data regarding the impacts of snowmobiling upon wolves since the entry of the district court's 1996 injunctive order.

[6] In holding that the private respondents should be permitted to intervene in the lawsuit, the court of appeals observed that the respondents had "submitted affidavits from several of [their] members stating that they have visited the Park in the past, that they plan to do so in the near and identifiable future, and that they will be injured directly if the

lenge that determination, see Pet. 15 n.5.[7]

Petitioners assert (Pet. 19) that the court of appeals' decision conflicts with the decisions of the First and Sixth Circuits in *United States* v. *AVX Corp.*, 962 F.2d 108 (1st Cir. 1992), and *Associated Builders & Contractors* v. *Perry*, 16 F.3d 688 (6th Cir. 1994), in which the courts dismissed the appeals of non-governmental intervenors after the government declined to pursue its own appeals. In each of those cases, however, the court of appeals found that the non-governmental intervenor lacked standing under Article III. See *AVX Corp.*, 962 F.2d at 112-120; *Associated Builders & Contractors*, 16 F.3d at 690-693. Because the private respondents in the instant case were expressly found to satisfy Article III

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restrictions on snowmobiling are lifted." Pet. App. 55A; see *ibid.* (summarizing specific averments of two members of Voyageurs Region National Park Association). In holding that the private respondents could pursue their appeal notwithstanding the government's dismissal of its own appeal, the court relied on its prior determination that the private respondents had established Article III standing. *Id.* at 8A-9A.

[7] The more apposite precedent is *Bryant* v. *Yellen*, 447 U.S. 352 (1980). In *Yellen*, certain landowners who were receiving irrigation water from a federal project challenged the government's position that they were obligated to comply with the acreage limitations applicable to federal reclamation projects generally. Non-federal entities which asserted that they might be able to purchase lands in the event that the acreage limitations were held to be applicable intervened and were aligned with the government. When the government declined to appeal an adverse district court ruling, this Court, agreeing with the court of appeals' conclusion that the intervenors satisfied Article III standing requirements, held that the intervenors could pursue the case independently on their own behalf. *Id.* at 366-368.

requirements, the decision below does not conflict with the rulings in those cases.[8]

3. Petitioners contend (Pet. 19-25) that the 1916 Organic Act provides no independent authority for the NPS to undertake wildlife protection measures because it has been superseded by the Endangered Species Act. That argument is without merit. Section 1 of the 1916 Organic Act states that the "fundamental purposes" of the national parks are "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1 (Supp. II

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[8] Petitioners suggest that the government "abandon[ed]" the closure order by declining to appeal from the district court's judgment, and that the court of appeals' decision interferes with legitimate Executive Branch prerogatives. See Pet. 14, 18. We do not agree. The court of appeals did not order the government to adopt any particular policy with regard to snowmobiling in Voyageurs National Park; it simply held that "the evidence in the administrative record on which the NPS based its decision to order the Park closures was sufficient to justify the determination and was not arbitrary or capricious." Pet. App. 17A. Petitioners' concern that the court of appeals has imposed a regulatory policy upon the NPS is particularly unwarranted in light of the court's own recognition that a closure order issued pursuant to 36 C.F.R. 7.33(b)(3) may last for no more than a year, and that any new closure order must be supported by a new administrative record. See Pet. App. 14A-15A. Finally, the government cannot properly be said to "abandon" (Pet. 14) a regulatory policy simply by declining to appeal from an adverse district court judgment. Cf. *United States* v. *Mendoza*, 464 U.S. 154, 160-161 (1984) (observing that the government considers a variety of factors in determining whether an appeal is warranted, and may properly decline to appeal a district court decision that it believes to be erroneous).

1996). The courts of appeals have consistently held that the 1916 Organic Act vests the NPS with broad discretion concerning the allocation of national park uses among competing park user groups. See, *e.g. Bicycle Trails Council of Marin* v. *Babbitt*, 82 F.3d 1445, 1454 (9th Cir. 1996); *Organized Fishermen of Fla.* v. *Hodel*, 775 F.2d 1544, 1550 (11th Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

Petitioners' reliance (Pet. 21-22) on *Bennett* v. *Spear*, 117 S. Ct. 1154 (1997), is misplaced. In *Bennett*, the FWS issued a biological opinion stating that the maintenance of minimum water levels in two federally-managed reservoirs was necessary to avoid jeopardy to two endangered species. The Court, stressing the "virtually determinative" effect of the biological opinion in that case, held that the opinion was subject to judicial review at the behest of private water users who contended that it imposed unduly severe constraints on withdrawals of water from the reservoir. See *id.* at 1165-1169.

Bennett makes clear that where governmental officials exercise coercive power in the course of implementing the ESA, their actions are subject to judicial review. *Bennett* also establishes that the plaintiff in such a lawsuit may contend that the requirements or prohibitions imposed by the government are in fact unnecessary to ensure compliance with the ESA. See 117 S. Ct. at 1168. Nothing in *Bennett* suggests, however, that federal land management officials are prohibited from voluntarily engaging in wildlife protection measures that the ESA itself does not compel.[9]

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[9] Petitioners also suggest in passing (Pet. 5-6, 10) that the 1992 closure order was undertaken solely upon compulsion of

4. Petitioners contend (Pet. 25-27) that the closure order was arbitrary and capricious because the evidence failed to show that snowmobiling would harm the wolves. The court of appeals employed the correct legal standard in conducting its review. It concluded that "the evidence in the administrative record on which the NPS based its decision to order the Park closures was sufficient to justify the determination and that the action was not arbitrary or capricious." Pet. App. 17A. Petitioners' fact-bound challenge to the court of appeals' application of the governing standard does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the FWS's biological opinion. The court of appeals, however, treated the closure as an exercise of discretionary authority by the NPS undertaken pursuant to 36 C.F.R. 7.33(b)(3). See Pet. App. 4A-5A, 13A-14A, 17A. Petitioners do not directly challenge that determination, which in any event raises no recurring legal issue. They argue instead that the ESA *precludes* the NPS from relying on the 1916 Organic Act as an independent grant of authority for wildlife protection measures. For the reasons stated above, that argument is without merit.